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IN THE

Supreme Court of the United States

OCTOBER TERM, [redacted] 1969

No. [redacted] 110

RUTH SNYDER, ET AL., *Petitioners,*

v.

WALTER J. HICKEL, Secretary of Interior, *Respondent.*

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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No.

RUTH SNYDER, ET AL., *Petitioners,*

v.

WALTER J. HICKEL, Secretary of Interior, *Respondent.*

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

This is a petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Tenth Circuit entered in this case on May 24, 1968, rehearing denied February 12, 1969.

OPINION BELOW

The opinion of the Court of Appeals and the opinion on rehearing are not yet reported and are attached as Appendix A. The same is true of the opinion of the district judge, which is attached as Appendix B.

JURISDICTION

The original opinion of the Court of Appeals, as noted above, was filed on May 24, 1968. A rehearing *en banc* was authorized, and after argument the matter was redecided on February 12, 1969. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

QUESTION PRESENTED

Whether the "marketability test" applies to mining claims for valuable metallic minerals; and if so, whether the test requires immediate commercial feasibility, and how and when "marketability" is to be determined.

STATUTE INVOLVED

The Act of May 10, 1872, 17 Stat. 91, 30 U.S.C. § 22 (App. F) provides in § 1 that citizens may enter and explore the public domain and, if they find "valuable mineral deposits," may obtain title in designated ways.

STATEMENT

This case arises from a mining claim. The Secretary of Interior in substance held the claim invalid, a decision which was reversed by the Federal District Court. While the matter was pending in the Court of Appeals, this Court decided *United States* v. *Coleman,* 390 U.S. 599, 88 S. Ct. 1327, 20 L. Ed. 2d 170 (1968), hereafter referred to as *Coleman.* The Court of Appeals thereupon summarily reversed the District Court, on the assumption that this was required by *Coleman.* A petition for rehearing *en banc* was allowed, but after the rehearing, the Court stood on its earlier decision without an independent opinion.

A. The Claim and the Interior Department Proceedings

On July 10, 1941, petitioners' predecessor, an independent prospector whose widow is the lead petitioner here, located a Colorado mining claim for valuable minerals, and on September 16, 1941, filed an appropriate location notice (T. 4). The land was at least subject to location for vanadium-uranium purposes. In recognition of its obvious value for this purpose, in 1948 the Government withdrew from mineral location a large tract, of which this was a part, for mineral exploitation by the Atomic Energy Commission. That withdrawal was subject to valid existing rights. In 1958, the petitioners produced and sold to the Commission a substantial quantity of these ores from their claim (T. 250-55).

In order properly to be paid by the Atomic Energy Commission for the minerals developed and produced, petitioners needed a certificate of title from the Bureau of Land Management. This the Bureau refused, instead challenging the validity of their claim.

The matter was heard in the Interior Department in 1961, with the Government as contestant. Two expert witnesses appeared for the Government and testified that no "discovery" had been made prior to the date of withdrawal.

This entire matter depends upon the standard of discovery applied by these two experts, and upon the basis of their testimony, since the Government had no other witnesses. The substance of their testimony, as later summarized by the District Court, was that in order to make a discovery within the contemplation of the statute, there must "be a discovery of minerals of sufficient commercial value to justify mining them

with an expectation of profit." The testimony is fully quoted in the opinion of the District Court, App. B, *infra*; the standard they applied was that the claim was not valid until actual production of ore was in hand. The Secretary of Interior affirmed the negative staff conclusion without ever coming to grips with the question of whether the proper standard had been applied by the Government witnesses, and the claim was thus disallowed.*

Assuming that the standard of marketability used by the experts is correct, this mine was located in 1941 and the withdrawal was made in 1948. The Government witnesses used a standard of marketability based on analysis of costs of production, which in turn was based at $20 a ton. This cost figure was based on a 1951-61 schedule (T. 215). The Government did not pretend to have any cost information for the pre-withdrawal period, and instead, the witness used his current knowledge and information (T. 115, 159, 161).

B. The District Court

The District Court reversed the Interior Department and allowed the claim. It found, first, that the expert witnesses on which the Government relied were not qualified. We put this aside on the assumption that this kind of particular judgment is not sufficiently substantial to bring here on certiorari.

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* A hard point in this case is that the Interior Department opinions did not focus on the standard of discovery actually applied by the only Government witnesses. The major Interior opinion assumes the prudent man test and does not allude to the experts' testimony in this regard. Judge Chilson at the District Court cut through the froth on top to the substance of the evidence. Appendices C, D, and E are the opinions of the Secretary, the Solicitor, and the Hearing Officer, respectively.

But the District Court also rested its decision on two other, completely independent grounds. As to the largest question in the case, it held that the Department was erroneously requiring a showing of immediate commercial value. The Court reached this conclusion by piercing the opinions to the actual evidence in the case for the purpose of determining whether any evidence at all sustained the result. It concluded that since the witnesses applied the wrong standard for their conclusions, there was no such evidence. It thought that the proper test was that of such cases as *Cameron* v. *United States,* 252 U.S. 450, 40 S. Ct. 410, 64 L. Ed. 659 (1920), on which it relied. By this test, the question was whether the discovery must be such as would justify a person of ordinary prudence in the further expenditure of his time and means in an effort to develop a paying mine.

Finally, the District Court found that if the test were, as the experts believed, a test of immediate marketability, then the expert opinion must be based on marketability as of the time of the discovery or the withdrawal, which in this case would be from 1941 to 1948. The experts had based their opinions heavily on post-1948 data.

The District Court concluded, "that the opinions of the witnesses, based as they were on information, facts and factors not shown to have been available to the Claimants at the time of the location of their claims, are without probative value."

C. The Court of Appeals

While the matter was pending in the Court of Appeals, this Court decided *Coleman.* The Court of Appeals thereupon summarily reversed the instant

case on the ground that *Coleman* required it. It held that by virtue of *Coleman,* the standard of discovery applied by the Interior Department must be approved and that no valid objection could be made to the experts or their opinions. See App. A, *infra.* On petition for rehearing *en banc,* the Court did hear the matter *en banc,* but then stood upon its earlier decision without elaboration.

REASONS FOR GRANTING THE WRIT

Coleman unquestionably opens an important new chapter in the mining law of the United States, but contrary to the dreary conclusion of the court below, that decision did not junk the established norms of mining discovery. The question of the proper standard is truly important; it affects claims by the thousand every year. Moreover, the decision below is squarely in conflict with another post-*Coleman* case, *Converse* v. *Udall,* 399 F.2d 616 (9th Cir. 1968), *cert. denied,* No. 746, Oct. Term 1968, 89 S. Ct. 635 (1969), hereafter referred to as *Converse.*

Coleman resulted from a mining claim on some 720 acres, essentially for building stone. The Interior Department contended that this was not a "valuable mineral deposit" because it could not be marketed at a profit—it applied what is called the "present marketability test." This Court in that case, which involved non-metallic minerals exclusively, held that in that kind of a case the marketability test is a "logical complement to the 'prudent man test,' " which is the identical test which was applied by the District Court in the instant case. That test, as both the District Court said in the instant case and this Court said in *Coleman,* is whether, "a person of ordinary prudence

would be justified in the further expenditure of his labor and means, with a reasonable prospect of success, in developing a valuable mine . . . ."

1. The decision below conflicts with *Coleman,* no matter how *Coleman* is interpreted. This Court made marketability a complement to the prudent man test; but the experts here made the "complement" the entire test and junked the heart of the thing.

2. The decision below grossly overextends *Coleman* by making it apply to the metallic minerals of high value. *Coleman* gave the appearance, at least, of being a phony claim. An applicant had made a stone claim in the vicinity of Los Angeles, was not using it as a mine at all or making any effort to develop it, and had built a splendid home on it. As this Court saw it, *Coleman* was indeed a very non-commercial mine.

But the instant case involves uranium. This Court expressly recognized in *Coleman* that the valuable mineral case would come along, and it said:

> ". . . the prudent-man test and the marketability test are not distinct standards but are complementary in that the latter is a refinement of the former. While it is true that the marketability test is usually the critical factor in cases involving non-metallic minerals of widespread occurrence, this is accounted for by the perfectly natural reason that precious metals which are in small supply and for which there is a great demand, sell at a price so high as to leave little room to doubt that they can be extracted and marketed at a profit." 390 U.S. at 603.

It was no accident that this Court noted the distinction between the common and the metallic minerals.

The prudent man test, and not the marketability test, does apply to the metallic deposit cases. *Adams* v. *United States,* 318 F.2d 861 (9th Cir. 1963); *United States* v. *Smith,* 66 I.D. 169 (1959); see also *Best* v. *Humboldt Mining Co.,* 371 U.S. 334, 83 S. Ct. 379, 9 L. Ed. 2d 350 (1963); *Cameron* v. *United States,* 252 U.S. 450, 40 S. Ct. 410, 64 L. Ed. 659 (1920); *Castle* v. *Womble,* 19 L.D. 455 (1894); all applying the prudent man test to rare minerals. The Interior Department developed the marketability test as a special limitation, or peculiar and specialized extension, for the common mineral cases. *Foster* v. *Seaton,* 271 F.2d 836, 838 (1959) (sand and gravel); *United States* v. *Strauss,* 59 I.D. 129 (1945) (gypsum and building stone); *United States* v. *Black,* 64 I.D. 93 (1957) (building stone). See generally 1 Amer. Law of Mining § 4.62 (1967), and *United States* v. *Heirs of Stack,* A-28157 (1960). *Foster* v. *Seaton,* 271 F.2d 836 (D.C. Cir. 1959), the leading case, does apparently provide for a narrower test of discovery only in cases of the common minerals, where there is particularly likely to be misappropriation of lands for other purposes.

If the new test is to be applied to an obviously precious mineral like uranium, this Court ought to say so.

3. The decision below conflicts with *Converse, supra.* This is the other major post-*Coleman* holding. In that case, the Ninth Circuit did disagree somewhat with the position we have taken in the immediately preceding paragraph. It did hold that the *Coleman* standard applies at least to a degree in the metallic cases, but only to a degree.

Specifically, the Ninth Circuit standard of the relevance of marketability in the valuable mineral cases

conflicts directly with that applied here. In a valuable metals case, the Ninth Circuit held "that there need *not* be a full showing of marketability, such as the Secretary required in *Coleman, supra.*" (Emphasis added.) The Court in *Converse* continued:

> "When the claimed discovery is of a lode or vein bearing one or more of the metals listed in 30 U.S.C. § 23,* the fact finder, in applying the prudent man test, may consider evidence as to the cost of extraction and transportation as bearing on whether a person of ordinary prudence would be justified in the further expenditure of his labor and means. But this does not mean that the locator must prove that he will in fact develop a profitable mine." 399 F.2d at 622.

Here is a direct conflict. The Ninth Circuit holds that as to a mineral like this, there need not be a "full showing of marketability," while the Interior Department in the present case looked for nothing but such a full showing. The Ninth Circuit said that the locator need not prove a profitable mine, while this was the only test of the Interior experts. According to the Interior witness, there could be no location until the locator "was reasonably assured of developing a paying mine."

It is no accident that the cases do not square, because the government simultaneously gave the two courts different advice. In this case at the Tenth Circuit, the government asserted that, "[t]he basic error to all of appellee's contentions is the assertion that entirely different rules apply as to metallic and nonmetallic minerals and that *Coleman* has no bearing

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* This statute predates our own generation's recognition of uranium as having special value, but the principle is the same.

on cases relating to metallic minerals." Government's Reply to Petition for Rehearing at p. 2. This is denounced as a supposed distinction. But in the Ninth Circuit, in *Converse* two months earlier, the government said "[a]ppellant argues that the marketability rule does not apply to minerals having intrinsic value since they are obviously saleable. This is, of course, true if the mineral is there in sufficient quantity and quality." Government's Supplemental Brief at p. 3.

The present marketability standard will hopelessly chill mining exploration, and as between the hard line taken in the Tenth Circuit and the more sensitive approach of the Ninth, it is genuinely important that the latter prevail. The test used to determine the validity of mining claims in this country affects 48 million acres of public land excluding the vast acreages in Alaska.* The low-grade deposits of copper ore near Butte, Montana, and in the Salt Lake Valley in Utah would never have been valid claims if the present marketability adjunct to the prudent man test had been applied in the early 1900's, and yet these deposits are economic; and so with Arizona and Nevada as well. The same may be said of many other mineral deposits. At a minimum, the relation of present marketability to the reasonableness of future marketability should be an adjunct to the prudent man test.**

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* Speech by Edward Weinberg, Solicitor of Department of Interior, given Sept. 13, 1968, as reported in *Gower Federal Service-Mining, Transmittal* 56 (1968).

** We take the facts and conclusion of the preceding paragraph from an article by W. J. Forman and R. G. Dwyer, soon to be published in the *Natural Resources Journal*. An immense amount of contemporary mining in the West is of materials which were of future potential at the time of their discovery.

The instant case is the genuine example of the individual entrepreneur, the prospector who stakes a claim. The test as applied here knocks this man out of the business unless he finds all of Sutter's gold at the first crack. Such consequence on hundreds or thousands of claims should not be allowed without a direct word from this Court.

4. The conflict of the Circuits is particularly acute on the narrower but real question of the evidence which may be used to determine marketability assuming that this is to be the test. As we noted above, the experts for the Government based their opinion of marketability on various cost calculations. All these were in turn based on records and information drawn from the rising inflationary period of the 1950's, and the witnesses had not even a claim to factual knowledge as to such items as costs in the 1940's.

The absence of any evidence contemporary to the relevant period was one of the independent grounds on which the District Court reversed the Interior Department. The Court of Appeals in its summary reversal not merely overextended the decision of this Court as to the standard of discovery, but also attributed to *Coleman* some bearing on the testimony of the experts, saying "the Supreme Court now makes it plain to us that in the case at bar . . . . the government witnesses were competent to testify as experts . . . ." The fact is that *Coleman* does not in the remotest way relate in any manner to expert testimony. The word "expert" and the word "witness" do not even appear in the *Coleman* case.

Converse, 399 F.2d at 622, expressly discusses the matter of time and holds that when the issue is dis-

covery as of a particular time, "it was proper to limit the inquiry as to what had then been found." It holds that later evidence may not be considered. Surely if later evidence of commercial production is excluded (as in the instant case the clearly valuable 1958 developments are put out of account) then the same must apply to later cost information. The District Court was exactly in accord with *Converse* on this point and the Court of Appeals conflicted with *Converse* by its reversal.

CONCLUSION

It is respectfully submitted that the petition for the writ of certiorari should be granted.

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May, 1969

APPENDIX A

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

May Term, 1968

No. 9671

STEWART L. UDALL, Secretary of the Department of the Interior of the United States of America, *Appellant*,

v.

RUTH SNYDER, Administratrix of the Estate of C. F. SNYDER, Deceased, J. F. ALLISON, MARILYN SITTON, Administratrix of the Estate of MAX SITTON, Deceased, and F. A. SITTON, *Appellees*.

Appeal From the United States District Court for the District of Colorado

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George R. Hyde (J. Edward Williams, Acting Assistant Attorney General of the United States, Lawrence M. Henry, United States Attorney for the District of Colorado, Richard T. Spriggs, Assistant United States Attorney, and Roger P. Marquis, Attorney, Department of Justice, with him on the brief) for Appellant.

Hale C. Tognoni (Robert L. Tognoni with him on the brief) for Appellees.

Before LEWIS and HILL, Circuit Judges, and CHRISTENSEN, District Judge.

PER CURIAM.

Opinion

Administrative proceedings culminated in a decision of the Secretary of the Interior that the appellees' unpatented lode mining claims were null and void for lack of discovery of a valuable deposit[1] as of March 30, 1948 when these lands were withdrawn and reserved for the use of the Atomic Energy Commission subject only to valid existing rights.[2] No question was or is raised concerning the validity of the withdrawal order.

The trial court upon a review of the administrative record set aside the decision of the Hearing Officer of the Bureau of Land Management declaring the claims in question to be invalid, as confirmed by the District Director of the Bureau and by the Assistant Solicitor of Land Appeals acting for the Secretary of the Interior, on the grounds that the Secretary applied an erroneous test of mineral discovery, that witnesses for the government had been incompetent to testify as experts on the question of discovery and that the evidence was insufficient to support the administrative determination.

We reverse on the authority of United States v. Coleman, U.S. , decided April 22, 1968. The appellant before us relied upon the opinion below in *Coleman,* 363 F2 190 (9 Cir. 1966). The trial court adopted reasoning similar to that of the Ninth Circuit. Cf. companion decision, Garula v. Udall, 268 F. Supp. 910 (D.C. Colo. 1967), today reversed, F2 (10 Cir. 1968). The Supreme Court now makes it plain to us that in the case at bar the Secretary applied the approved standard in determining that for want of a valuable mineral deposit no discovery had been made by appellant at the time the land in question was validly withdrawn; that the administrative determination was binding upon the court if supported by

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[1] Act of May 10, 1872, 17 Stat. 91, 30 U.S.C. § 22.

[2] Public Land Order No. 459, Mar. 25, 1948, 13 Fed. Reg. 1763.

substantial evidence on the whole record; that the government witnesses were competent to testify as experts with reference to the prudent man test, and that the Secretary's decision was supported by substantial evidence on the whole record and was not clearly erroneous.

Of no determinative concern in this case are refinements of evidentiary problems concerning the extent to which resort may be had to technological aids and inferences in the modern context on the basic issue of mineral discovery as now defined by the Supreme Court. Nor do we find it necessary to decide whether, as contended by the Secretary, there is a more limited judicial review of his decisions in this type of case than the one accepted by the trial court applied here.

On Rehearing

George R. Hyde (Clyde O. Martz, Assistant Attorney General, Lawrence M. Henry, United States Attorney, Richard T. Spriggs, Assistant United States Attorney, and Roger P. Marquis were with him on the brief) for Appellant.

John P. Frank of Lewis Roca Beauchamp & Linton (Hale C. Tognoni of Tognoni & Pugh, and Robert L. Tognoni, were with him on the brief) for Appellees.

EN BANC.[1]

PER CURIAM.

This case having been reargued before the court sitting en banc on petition for rehearing we hold appellees' contentions to be without merit and adhere to the original opinion of the court filed herein.

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[1] Breitenstein, Circuit Judge, deeming himself disqualified, did not participate.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 66-C-131

RUTH SNYDER, Administratrix of the Estate of C. F. Snyder, Deceased, J. F. ALLISON, MARILYN SITTON, Administratrix of the Estate of MAX SITTON, Deceased, and F. A. SITTON, *Plaintiffs*,

v.

STEWART L. UDALL, Secretary of the Department of the Interior of the United States of America, *Defendant*.

Messrs, Tognoni & Pugh, Hale C. Tognoni, Esq., Attorneys at Law, 610 First National Bank Building, Phoenix, Arizona; and Robert L. Tognoni, Attorney at Law, 5570 South Broadway, Littleton, Colorado, for the Plaintiffs; Lawrence M. Henry, United States Attorney, Richard T. Spriggs, Assistant United States Attorney, 323 United States Court House, Denver, Colorado, and Thomas L. McKevitt, Attorney, United States Department of Justice, Washington, D. C., for the Defendant.

Memorandum Opinion and Order

CHILSON, District Judge.

This matter came on to be heard before the Court on the 20th day of February, 1967. The Court heard the arguments of counsel and has considered the briefs filed by the parties and is fully advised.

This is an action to set aside a decision that the Master Deluxe and the Deluxe mining claims are invalid.

On July 10, 1941, C. F. and C. A. Snyder located the Master Deluxe and Deluxe mining claims on public lands in the Slick Rock area of San Miquel County, Colorado. The claims are located in Sections 22 and 27, T. 44 N., R. 19 W., N. M. P. M.

On March 30, 1948, by Public Land Order 459, the lands upon which the claims were located were withdrawn from mineral entry *subject to valid existing rights.* No steps were taken by the Government at that time to question the validity of the claims.

In 1958 and 1959, some 2,500 tons of vanadium and uranium ore were produced from the claims (Tr. 255). In 1960, the Bureau of Land Management of the Department of Interior (hereafter referred to as B. L. M.) instituted proceedings to have the claims declared invalid on the ground that there had been no discovery of minerals on the claims prior to the withdrawal of March 30, 1948.

Following prescribed procedure, a hearing was had before a B. L. M. Hearing Officer, who declared the claims invalid. Upon appeal to the Director of B. L. M. and further appeal to the Secretary of Interior, the decision of the Hearing Officer was affirmed.

The sole ground for contest of the claims is B. L. M.'s assertion that there was "no discovery" prior to the March 30, 1948 withdrawal of the land from mineral entry. *The parties agree the burden of proof is upon B. L. M. to make a prima facie case of "no discovery."*

The matter is now before the Court to review the record made before the Hearing Officer to determine whether or not there is substantial evidence making a prima facie case in support of the Secretary's decision affirming the Hearing Officer's determination that there was no discovery. *Pan American Petroleum v. Udall,* 352 F. 2d 32 (10th Cir. 1965); *Dredge Corporation* v. *Penny,* 338 F. 2d 456 (9th Cir. 1964).

Before discussing the evidence, it becomes important to define "discovery." The applicable statute, 30 U.S.C. § 23, provides: ". . . no location of a mining claim shall be made until the *discovery* of the vein or lode . . ." (Emphasis supplied.)

Although the statute does not define the word "discovery", it is now well established that a discovery required by the statute consists of:

1. The discovery of minerals within the boundaries of the mining claim; and

2. The discovery must be such as would justify a person of ordinary prudence in the further expenditure of his time and means in an effort to develop a paying mine (*Cameron* v. *U. S.*, 252 U.S. 450; *Chrisman* v. *Miller*, 197 U.S. 313).

We have reviewed the evidence to determine whether or not B. L. M. sustained its burden of proof.

The following facts are not in dispute: The claims were located on July 10, 1941 and Location Certificates were recorded in the public records of San Miguel County in September 1941; at the time of location there was a discovery of vanadium-uranium mineral; from 1944 until 1958, the annual assessment work was done or the required notice in lieu of assessment work was filed. (See abstract in file.) at the time of the examination of the claims by B. L. M. in 1959 and 1960, there was mineral in place, principally vanadium-uranium; of the samples taken by B. L. M. and assayed, most were of low grade, but one was of ore grade (Tr. pgs. 56, 57, 204 and 212); in 1958, Sitton acquired a one-half interest in the claims and after some exploratory drilling, sunk a shaft to an ore body approximately 200 feet below the surface from which some 2,500 tons of uranium-vanadium ore were produced (Tr. pgs. 250, 251 and 255).

At the hearing, B. L. M. called two of its employees (Spengler and McIntosh) to prove a prima facie case of no discovery. Both testified as expert witnesses that although there was a discovery of mineral on the surface of the claims, in their opinion the mineral discovery did not constitute a discovery sufficient to support a valid mining

claim and gave their reasons for their opinions in considerable detail.

After careful consideration, we conclude the testimony of Spengler and McIntosh is without probative value for the following reasons:

1. The witnesses were not qualified to give opinion testimony as to what a man of ordinary prudence would or would not have done in 1941 with regard to the expenditure of time and means in an effort to develop a paying mine on these claims.

2. Even if Spengler and McIntosh had the qualification to testify as experts, their expert testimony has no probative value because they based their opinions of "no discovery" on information available to the witnesses at the time of the hearing in May 1961 and not on the information available to a person of ordinary prudence in 1941 when the minerals were discovered and the claims were located.

3. That the witnesses Spengler and McIntosh, in arriving at their opinions of "no discovery" included a requirement of discovery not required by the Supreme Court in *Cameron, supra,* namely, that the "discovery" must be a discovery of minerals of sufficient commercial value to justify mining them with an expectation of profit.

I. Government's Witnesses Lacked Qualifications To Give Opinion

"An expert witness will be deemed qualified if, and only if, he possesses special skill or knowledge with respect to the matter involved so superior to that of men in general as to make his formation of a judgment a fact of probative value." 32 C.J.S. § 457 pg. 98.

Exhibit 38 sets forth the qualifications of Spengler. He graduated in June of 1955 from the City College of New

York with a Bachelor of Science Degree; July 1955 to September 1955, helper on a diamond core drill; September 1955 to February 1957, geologist with the Atomic Energy Commission; February 1957 to present, employed by B. L. M. as Evaluation Engineer.

Exhibit 40 gives the qualification of McIntosh. He graduated in June 1941 from the Ohio State University with a Bachelor's Degree in engineering and mining; June 1939 to October 1939, worked in a coal mine in Kentucky; June 1940 to October 1940, a laborer in gypsum exploration; June 1941 to October 1941, a laboratory worker; June 1942 to October 1942, prospecting in Nova Scotia; October 1942 to March 1944, metallurgist in beneficiating magnacite ores; March 1944 to September 1946, military service; September 1946 to July 1948, research engineer on beneficiating of ores by flotation; July 1948 to December 1949, laborer, panner of gold, placer prospecting, rod-man, gold cleanup man and assayer in Fairbanks, Alaska; February 1950 to March 1952, flotation research, dolomite prospect drilling, prospecting open-pit layout; April 1952 to December 1953, geodetic computer and surveying for U. S. Geological Survey; September 1953 to February 1955, metallurgist beneficiating maganese ores by flotation; March 1955 to March 1957, metallurgist beneficiating gold, silver, lead, zinc ores by flotation; March 1957 to present, employed by B. L. M. as Evaluation Engineer.

The prudent man rule, as applied to discovery of mining claims, necessarily means a prospector of ordinary prudence who is attempting to locate deposits of minerals which would justify the expenditure of time and effort to develop a paying mine. The standards to be applied in determining what a prudent prospector would or would not do are not those of a trained engineer or geologist and are not even necessarily determined by the prudence of a *skilled miner*. *Chrisman* v. *Miller*, 197 U.S. 313 at 323. There is nothing in the background and experience of either Spengler or McIntosh which would give them any

special knowledge of what a prospector of ordinary prudence would or would not do in attempting to develop a vanadium or uranium mine on the Colorado Plateau in 1941.

Neither of them had any experience in prospecting for or in the development of vanadium and uranium claims in the Colorado Plateau area or elsewhere. Perhaps Spengler had expertise as to what a trained geologist would or would not have done in the circumstances and perhaps McIntosh had expertise to testify as to what a trained mining engineer would or would not have done, but the evidence discloses no foundation for their opinion testimony as to what a prospector of prudence would or would not do. Because of lack of qualifications, the opinions of Spengler and McIntosh are without probative value and in the absence of their opinions, there is no evidence to sustain the Government's burden of proof.

II. Government's Witnesses Based Their Opinions on Information Available to Them in 1961 and Not on Information Available to a Person of Prudence in 1941.

In support of their opinions, Spengler and McIntosh testified to the geology of the area, the size, shape and location of mineral deposits in the Colorado Plateau; the nature and extent of surface mineralization of the claims in question; the samples taken and their assay values; the costs of mining; the market values of vanadium and uranium and the market for these minerals.

All of these areas of inquiry were pertinent and material as they are matters which a prudent prospector might well take into account in determining whether or not a mineral discovery justified the expenditure of time and means in an effort to develop a paying mine. However, these areas of inquiry were pertinent and material only to the extent that it was shown that the information testi-

fied to was available to a prudent prospector at the time the plaintiffs located their claims. Information not available to a prudent prospector at that time is entirely immaterial in determining what a prudent prospector would or would not have done. Even a casual reading of the record discloses that the witnesses based their opinions not on information available to the claimants as prudent prespectors in 1941 but upon information available in 1961 to these witnesses after careful research and study.

Some of the more extreme examples of this are tabulated below:

1. Exhibit 4, a U.S.G.S. Quadrangle geologic map was admitted in evidence to show the geology of the area and was used by the witnesses in giving their opinions on what a prudent prospector would or would not do. *This map was published in 1950* (Tr. pgs. 13 and 14).

2. Exhibit 5, a U.S.G.S. map was admitted into evidence and used in connection with testimony. *It was published in 1948* (Tr. pgs. 14 and 15).

3. Exhibit 20, a U.S.G.S. paper or the "Geology and [line illegible] into evidence as part of the basis for the conclusion of the witnesses that there was no discovery in 1941. *This document was published in 1958* (Tr. pg. 101).

4. The witnesses testified to three theories of the U.S.G.S. as to ore placement. Which of these theories is correct has not yet been resolved (Tr. pg. 27). There was no showing that these theories had been published or were otherwise available to a prudent prospector in the year 1941. The purpose of this testimony was, "We contend that certainly one of the things he (a prudent person) would have to take into consideration is, how did these ore bodies, if there are any, get here, and is there any connection between what might be at the surface and what might be at

the depth." (Tr. pg. 30) The witness McIntosh also testified to these theories (Tr. pg. 195). Nowhere in the entire transcript is there any evidence or indication that these theories had been made known to the public in the year 1941 or at any other time.

5. Use of a Geiger counter in appraisal of surface mineralization (Tr. pgs. 42 and 43). There is no testimony that a Geiger counter was available as a prospecting tool in 1941. In fact, the evidence indicates it was not (Tr. pg. 244).

6. Use of Atomic Energy Commission buying guide to establish the price of uranium and vanadium ores with the ultimate objective of showing the absence of valuable deposits on the claims (Tr. pgs. 112, 113 and 215). *The Atomic Energy Commission was not established until April 1946 and the buying guide was not issued until April 1948 and covered the period from 1951 to 1961* (C.F.R. Title 10, Part 60 and Tr. pg. 215).

7. Both witnesses testified as to the costs of mining for the purpose of showing that a prudent prospector, because of these costs, would not expend time and effort in attempting to develop a paying mine. *This testimony was based on a Bureau of Mines publication issued in 1959 based on "recent costs"* (Tr. pgs. 115, 159 and 161).

8. Reliance on publications and articles in support of the opinion that there was no connection between surface mineralization and the deposit which was mined in 1958 (Tr. pgs. 178 and 179). The publications relied upon are listed at pages 180 and 184 of the transcript. Of the approximate 13 publications mentioned, four were published prior to 1941, one in 1947 and *the eight remaining publications were published from 1952 to 1959.* All of this material was considered in arriving at the opinion that a prudent prospector would not be justified in expending time

and effort in attempting to develop a paying mine in 1941 (Tr. p. 183).

9. Use of market price established by Atomic Energy Commission for uranium and vanadium in the *years 1951 to 1961* (Tr. pg. 215) to support opinion that a prudent prospector could not expect to develop a paying mine in 1941.

Claimants, by repeated objections, sought to have the testimony directed towards facts and information which may have been available to a prudent prospector at the time the claims were located but to no avail.

We conclude that the opinions of the witnesess, based as they were on information, facts and factors not shown to have been available to the Claimants at the time of the location of their claims, are without probative value.

III. Witnesses' Opinions Were Based on an Erroneous Legal Theory

"It has frequently been stated that discovery in order to be valid need not be of ore in commercial quantities or of quantity and quality which will yield a profit." (American Law of Mining, Vol. I, § 4.26, pg. 642).

"If the miner were required to demonstrate commercial value at the time he makes his initial discovery, the intent of the mining laws would be totally frustrated; and the value requirement contained in the prudent man test thus seems to represent a reasonable tempering of the statutory value requirement to the very real problems facing the discoverer and locator who goes upon the ground to stake his claim." (American Law of Mining, Vol. I, § 4.26, pg. 643).

"Although the Land Department still recognizes the prudent man test and has stated that it is not necessary to show values which will demonstrate that a 'claim

can be worked at a profit or that it is more probable than not that a profitable mine operation can be brought about,' at least in cases involving minerals having intrinsic value, the recent decisions of the Land Department indicate that it has adopted a very strict view of discovery, and is quite close to requiring a showing of commercial value even in cases not involving common varieties of mineral." (American Law of Mining, Vol. I, § 4.26, pg. 645).

Consideration of the testimony of the witnesses Spengler and McIntosh reveals that their opinions of "no discovery" are based on the premise that the minerals discovered were not of commercial value and therefore the discovery is not sufficient to sustain a valid mining claim.

The witness McIntosh testified that the minerals discovered by the claimants deserved "some more exploratory work, but they do not deserve the commencing of mining operations:" (Tr. pg. 212).

He testified further:

"Q. Now, let's assume for the moment, Mr. McIntosh, that all of the workings that have been placed on these claims since 1948 are not used. Based upon just the showings that are on the surface which you have examined, would any expenditure be justified for further exploration based upon these showings?

"A. Yes, it would.

"Q. Why?

"A. Because there is a meager showing of uranium and vanadium present, and it's barely possible that it could lead to something worth while.

"Q. Now, I would then ask you the same question, whether an expenditure would be justified for development of mining operations *to mine any of these shows* of minerals which we are talking about?

"A. No, it definitely would not be justified." (Tr. pgs. 220 and 221) (Emphasis added).

He testified further:

"A. The locators located their mining claim in 1941. They produced no ore before the 1950's. And the claim was still in the exploration stage. And in the 1950's several lessees or several sublessees went on the claims, but they produced no ore, either. The claims were still in the exploration period. These lessees or sublessees did exploration work consisting of drilling a hole. About 1958 the present operators of the claim went on to the claims and found an ore body which they are now mining. *To me, the date that this last group went on the claims, sunk their holes and found ore, was the date the claims passed from the exploratory state to the development and production stage.*" (Tr. pg. 226) (Emphasis added).

It is apparent from this testimony that the witness McIntosh did not recognize a discovery until after all exploration work was done and actual production of commercial ore had commenced.

To the same effect is the testimony of the witness:

"Q. Now, then, as I get it from your testimony, it would be your opinion that in order to make a valid discovery, you would have to have a pit that practically went to ore that was commercially marketable; is that correct?

"A. The pit which the claimant relies upon for his discovery must show an indication of mineralization, such that the claimant has the reasonable prospect of *developing a paying mine from this show.* The claimant, as I have testified previously, would base his opinion upon the extent of his mineralization and its geologic habit, upon geologic inference, upon similar shows of mineral in the vicinity, and *if he had such a showing of minerals that he was reasonably assured*

of developing a paying mine from this show of mineral, he would be justified in staking a mining claim." (Tr. pg. 138) (Emphasis added).

Although the test used by the witnesses may be in accord with B. L. M. policy, it goes far beyond the requirements of *Cameron, supra,* and their opinions of "no discovery", being based on an erroneous test, are without probative value.

For the reasons assigned, the Court concludes that B. L. M. did not make a prima facie case of "no discovery" and that the decision of the Hearing Officer and its affirmance by the Assistant Director of B. L. M. and by the Solicitor, acting for the Secretary of Interior, should be set aside.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that the decision of the Hearing Officer entered on June 15, 1962 in Colorado Contest No. 236—United States v. C. F. Snyder, et al., declaring the Deluxe and the Master Deluxe Lode Mining Claims, heretofore described, invalid and the decision of the Assistant Director of B. L. M. and the decision of the Assistant Solicitor of Land Appeals, acting for the Secretary of Interior, affirming the decision of the Hearing Officer upon appeal, are hereby set aside.

ENTERED this 18th day of April, 1967.

BY THE COURT:

HATFIELD J. CHILSON II

APPENDIX C

Opinion on Appeal to the Secretary of the Interior

UNITED STATES DEPARTMENT OF THE INTERIOR
BUREAU OF LAND MANAGEMENT
WASHINGTON, D. C.

March 13, 1964

Decision

UNITED STATES OF AMERICA, *Contestant-Appellee*

v.

C. F. SNYDER, J. F. ALLISON, MAX SITTON, and F. A. SITTON, *Contestee-Appellants*

Involving the Deluxe and Master Deluxe lode mining claims situated within secs. 22 and 27, T. 44 N., R. 19 W., N. M. P. M. (Lower San Miguel Mining District—San Miguel County, Colorado).

DECISION AFFIRMED

The above-named Contestee-Appellants have appealed from the decision of the Hearing Examiner dated June 15, 1962, declaring invalid the above-identified mining claims. The basis for the decision was that no discovery of a valuable mineral had been made on the claims within the meaning of the United States mining laws prior to the effective date of Public Land Order No. 459 which withdrew the lands embraced by the claims from mineral entry as of March 30, 1948.

Contestees filed an answer in the form of a general denial of the allegations contained in the complaint. A hearing was held at Denver, Colorado, on May 16 and 17, 1961.

The issue framed by the Examiner was whether the Deluxe and Master Deluxe lode mining claims were valid

existing claims on March 30, 1948, and thus within the exceptions proviso of Public Land Order 459.

From the evidence adduced, the Examiner found that the Deluxe and Master Deluxe mining claims were located on July 10, 1941, for the mining of uranium and vanadium, and that the Contestant had presented sufficient evidence to constitute a prima facie case that no valid discovery of minerals had been made on these claims prior to March 30, 1948. He further found that the evidence presented by the Contestees was insufficient to establish that the two mining claims were valid existing claims on March 30, 1948, the effective date of Public Land Order 459, and therefore, did not come under the exception of the withdrawal provision of the Order.

On appeal, the Contestees contend, in substance, that the Contestant's evidence was insufficient to support the findings and conclusions contained in the Examiner's decision. However, they acknowledge that the burden of the Contestant was only to present a prima facie case, and that the burden then shifted to the contestee to prove a discovery prior to March 30, 1948, sufficient to establish the validity of the two claims by a preponderance of affirmative, substantive and probative evidence. Contestees submit in their appeal brief a detailed analysis of the testimony and exhibits in their appeal brief a detailed analysis of the testimony and exhibits presented at the hearing, but complain of surprise in the tenor of the evidence presented by the Contestant which they assert was based on theory. With their appeal the contestees filed a motion to remand the case for further hearing or the taking of additional evidence to refute the Contestant's evidence. The motion is supported by the affidavits of several mining engineers, a geologist and miners who are familiar with the Deluxe and Master Deluxe mining claims and/or the area in which these claims are located.

The Contestant filed an answer alleging, in substance, that the Contestees have failed to show any error in the hearing or in the Examiner's decision. They have failed to indicate any newly discovered evidence or present any other reason which would serve as a basis for a rehearing. Moreover, the Contestant requests a determination of the Examiner's refusal to permit a witness for the Contestant to testify as to the substance of a conversation had with one of the Contestees.

The basic issue presented for consideration in this appeal is whether or not the Contestees established by a preponderance of the evidence that a valid discovery was made on the Deluxe and Master Deluxe mining claims prior to March 30, 1948. The Examiner found that the evidence of discovery was insufficient to invoke the exception of the withdrawal order, and declared the claims invalid.

Upon careful examination of the entire record including the extensive briefs, affidavits and arguments urged by the parties, we have concluded that the Examiner's decision is correct.

In this connection, we feel it is appropriate to discuss briefly the principles relative to a discovery under the mining laws and as they pertain to the facts in this case.

The Contestees contend that indications of minerals were found on the two claims during 1941 and 1944, in sufficient quantities to warrant a prudent man to expend time and money in further exploration with a reasonable expectation of developing a paying mine. They direct attention to the establishment in 1958 of a working mine on the Master Deluxe claim from which 770 tons of ore were removed in 1959. Under normal circumstances these facts would be sufficient to establish the existence of a valid discovery even though there was a lapse of considerable time between the indicated mineralization and the estab-

lishment of the mine. But, as in this case, where an intervening event (issuance of Public Land Order 459) required that the elements of a discovery be completed before the intervention of such event, subsequent mining activities are immaterial to the actual discovery. Moreover, the mine is not located at the points indicated as the place of the claimed discoveries, and there was evidence offered by the Contestees that additional exploratory work was not done until 1958.

The Department and the Courts have consistently held that mere indications, however strong, are not sufficient to satisfy the requirements of the mining laws as one of the essential conditions to the making of a valid discovery. *Cf. Nevada Sierra Oil Company* v. *Home Oil Company,* 98 Fed. 673, 675; also see *United States* v. *Frank J. Miller,* 59 I.D. 446 (1947).

There is a material difference between a discoverer being willing to spend his time and money in exploiting the ground and being justified in doing so. The former is a question to be answered by the miner himself; the latter would be a question for determination at a hearing based on the evidence presented. *Cf. Burke* v. *McDonald,* 2 Idaho 1022, 3 Idaho 296, 29 Pac. 98, 101.

The Examiner found from the evidence presented relative to the indication of minerals that a prudent man would not be justified in making further expenditures of time and money prior to the withdrawal in 1948. As the Examiner is the trier of the facts, he is in a much better position to determine the weight to be given testimony than can be determined from the record on appeal. Accordingly, his determinations will not be disturbed unless they are clearly shown to be against the greater weight of the evidence, profound error is apparent in his judgment or it is determined that he has acted in an arbitrary and capricious manner. These elements are not apparent in this case nor are they alleged.

The Contestees had the burden of proof to show by a preponderance of evidence that a valid discovery of minerals had been made before March 30, 1948, and the failure to present their case in its best light can not be attributed to the Contestant or the manner in which it established its prima facie case. The Contestees now allege surprise and have submitted additional showings, in the form of affidavits, relevant to the quality of the mineralization and the geology of the area in which these claims are situated. The Contestant has objected to the consideration of this newly offered evidence in processing the appeal. Since the mining contests are governed by the Administrative Procedure Act (5 U.S.C., 1958 ed., 1001 *et seq.*) a hearing on all the disputed issues of fact is held before a Hearing Examiner with both Contestant and Contestee entitled to present all relevant testimony and other evidence that they may desire, subject to cross examination. Under section 7 of the Act (5 U.S.C., 1958 ed., 1006), the transcript of the hearing constitutes the exclusive record for the decision, and the appeal decision must be rendered upon the basis of the evidence adduced at the hearing in which all parties had equal opportunity to present evidence pertinent to their position. Accordingly, there can be no question that the evidence submitted with the appeal, in this case in support of the motion to remand, if considered at all, can only be examined to determine if it is of such a substantive value or was not available at the time of the hearing to warrant remanding the case for a new hearing. Under no circumstances can it be considered as a basis for any reversal of the Hearing Examiner's decision on the substantive merits of the case. *Cf. United States* v. *Basil Capp, et aux.*, A-27744 (December 12, 1958). It is therefore concluded on the basis of a careful study of all the evidence and testimony in the record and the additional evidence submitted on appeal that no substantial grounds have been presented which would warrant remanding the case for a

further hearing. Accordingly, the motion to remand is denied.

We now turn to the Contestant's request for a determination of the Examiner's refusal to consider or rule on its offer of proof relative to statements made by one of the Contestees (Max Sitton) to witnesses (Ralph R. Spengler and James McIntosh) for the Contestant. The Department's rules of practice (43 CFR 221.74(b)) provide in pertinent part that:

> "(b) Objections to evidence will be ruled upon by the Examiner. Such rulings will be considered, but need not be separately ruled upon, by the Director in connection with his decision. * * *"

However, in the circumstances presented, it is appropriate that consideration be given this matter. It appears that statements made by the Contestee may have been material to the issue raised in this case, but the Examiner refused to accept the tendered evidence because the Contestant had made no attempt to secure the testimony of the Contestee by subpoena or by deposition. Generally, admissions made by a party are considered competent, not as testimony but because they are inconsistent with the position taken by the party who made them. However, admissions bind only the party by whom made or to whom attributable; therefore, the Examiner could have accepted the testimony of the witness insofar as it affected the interest of Max Sitton. The admissions would have been immaterial and incompetent evidence as they concerned the rights of the other Contestees because of its hearsay connotations. The Examiner had to use his discretion in excluding or accepting the testimony for what it was worth. He chose to exclude it. As a result, it was incumbent upon the Contestant to show injury to its position, but this has not been done, nor is there any indication that the final outcome of the hearing would have been different. Accordingly, the

exclusion of such testimony is not considered to be prejudicial error. *Cf. Buhl* v. *Kavanagh,* 118 Fed. 2nd 315. No issue is raised concerning the Examiner's rulings on the findings of fact and conclusions of law; therefore, no determination is required by this decision.

No error being apparent on the face of the record, the Hearing Examiner's decision is affirmed.

The Contestees are allowed the right of further appeal to the Secretary of the Interior in accordance with the regulations in 43 CFR Part 221, as amended. See enclosed Form 4-1365. If an appeal is taken, it must be filed with the Director, Bureau of Land Management, Washington, D. C. 20240 and the filing fee will be $10. In taking an appeal there must be strict compliance with the regulations. If an appeal is filed, the appellants will have the burden of proving wherein the decision appealed from is in error.

APPENDIX D

Opinion on Appeal to the Solicitor for Land Appeals

UNITED STATES DEPARTMENT OF THE INTERIOR
OFFICE OF THE SECRETARY
WASHINGTON, D. C. 20240

Decided May 26, 1965

A-30292

UNITED STATES

v.

C. F. SNYDER, *et al.*

Colorado Contest No. 236

Lode mining claims
declared null and void

Affirmed

APPEAL FROM THE BUREAU OF LAND MANAGEMENT

C. F. Snyder, J. F. Allison, Max Sitton, and F. A. Sitton have appealed to the Secretary of the Interior from a decision of the Assistant Director, Bureau of Land Management, dated March 13, 1964, which affirmed a decision of a hearing examiner, dated June 15, 1962, declaring invalid the DeLuxe and Master DeLuxe lode mining claims, situated in secs. 22 and 27, T. 44 N., R. 19 W., N.M.P.M. (Lower San Miguel Mining District, San Miguel County, Colorado). The basis for the decision was that no discovery of a valuable mineral deposit had been made on the claims within the meaning of the United States mining laws prior to the effective date of Public Land Order No. 459, 13 F.R. 1763, which withdrew the lands embraced by the claims from mineral entry as of March 30, 1948, and reserved them for the use of the Atomic Energy Commission.

A hearing was held at Denver, Colorado, on May 16 and 17, 1961. According to location certificates introduced at the hearing, the claims involved were located September 10, 1941, by C. F. and C. A. Snyder, the discovery mineral apparently being vanadium. The issue framed by the examiner was whether the claims involved were valid existing claims on March 30, 1948, and thus within the provision of Public Land Order 459 which excepted from the withdrawal "valid existing rights." To be valid claims as of that date, there must have been a discovery of a valuable mineral deposit within meaning of the mining laws on the claims as of that date.

Appellants submitted on appeal to the Director six affidavits by professional mining engineers, a geologist, and miners familiar with the area, allegedly contravening the Government's testimony. These affidavits were submitted to support their request for a further hearing. The Assistant Director denied the request.

On appeal to the Secretary, the appellants repeat several contentions made below. They contend, *inter alia*, that the case should be remanded for the taking of further testimony because they were allegedly surprised at the hearing by a novel geological theory presented by the Government; they contend that since they were not professional geologists they were not then able to refute the Government's testimony. The appellants also repeat their contention that the law of discovery was not properly applied in this case. They contend further that the Government did not make out a prima facie case of absence of discovery—that the Government's case was based upon unproved geological theory and information derived after 1955, which was thus not available to a miner in 1941 or 1948.

They contend that when the contestant in a mining case makes out a prima facie case the burden of going forward

shifts to the contestee but the burden of proof remains upon the contestant to prove absence of discovery.

The last contention is contrary to well established law. *Foster* v. *Seaton,* 271 F. 2d 836 (D.C. Cir. 1959), states at pages 837-838:

> "Appellants' third allegation of error is that the Secretary failed to hold the Government to the standard of proof required by the Administrative Procedure Act, which states that 'the proponent of a rule or order shall have the burden of proof.' 60 Stat. 241 (1946), 5 U.S.C.A. § 1006. The Secretary ruled that, when the Government contests a mining claim, it bears only the burden of going forward with sufficient evidence to establish a prima facie case, and that the burden then shifts to the claimant to show by a preponderance of the evidence that his claim is valid. The short answer to appellants' objection is that they, and not the Government, are the true proponents of a rule or order; namely, a ruling that they have complied with the applicable mining laws. One who has located a claim upon the public domain has, prior to the discovery of valuable minerals, only 'taken the initial steps in seeking a gratuity from the Government.' * * * Until he has fully met the statutory requirements, title to the land remains in the United States. * * * Were the rule otherwise, anyone could enter upon the public domain and ultimately obtain title unless the Government undertook the affirmative burden of proving that no valuable deposit existed. We do not think that Congress intended to place this burden on the Secretary."

See also *United States* v. *Kelly Shannon et al.,* 70 I.D. 136 (1963); *United States* v. *Robert G. and Orpha B. McMillan,* A-29456 (July 26, 1963).

As to the rule of discovery, the correct rule was applied in this case as set forth by the hearing examiner in his decision:

> "The time-honored test to be applied in determining whether a discovery has been achieved on a lode claim is that set forth by the Department in *Jefferson-Montana Copper Mines Company,* 41 L.D. 320 (1912):
>
> " '1. There must be a vein or lode of quartz or other rock in place.
>
> " '2. The quartz or other rock in place must carry gold or some other valuable mineral deposit.
>
> " '3. The two preceding elements, when taken together, must be such as to warrant a prudent man in the expenditure of his time and money in an effort to develop a paying mine.
>
> " 'It is clear that many factors may enter into the third element: the size of the vein as far as disclosed, the quality and quantity of mineral it carries, its proximity to working mines and location in an established mining district, the geologic conditions, the fact that similar veins in the particular locality have been explored with success, and other like facts, would all be considered by a prudent man in determining whether the vein or lode he has discovered warrants a further expenditure or not.'
>
> "In other words, to constitute adequate discovery under the mining laws it must be conclusively established by competent evidence that a mineral deposit has been actually *found* and physically *uncovered* within the limits of *each* mining claim located, *and* that the situation and formation of the mineral so found and uncovered are such as to justify a prudent man in the further expenditure of time and money, with a reasonable prospect of success, in developing a valuable mine."

See also *Castle* v. *Womble*, 19 L.D. 455 (1894); *Chrisman* v. *Miller*, 197 U.S. 313 (1905); *Cameron* v. *United States*, 252 U.S. 450 (1920); *Best* v. *Humboldt Placer Mining Company*, 371 U.S. 334 (1963); and *Mulkern* v. *Hammitt*, 326 F. 2d 896 (9th Cir. 1964).

A showing of isolated bits of material, not connected with or leading to substantial values, does not constitute a discovery. *United States* v. *Frank J. Miller*, 59 I.D. 446 (1947); *United States* v. *Richard L. and Nellie V. Effenbeck*, A-29113 (January 15, 1963). Nor is it sufficient to constitute a discovery that the mineral showings indicate only that more exploratory work is warranted. *United States* v. *Clyde R. Altman and Charles M. Russell*, 68 I.D. 235 (1961). Nor may a discovery be based upon geological inference since geological inference, no matter how strong, cannot be substituted for discovery and the showing of mineralization on nearby claims cannot serve to establish discovery. *Cf. H. Leslie Parker et al.*, 54 I.D. 165 (1933); *United States* v. *John R. and Pearl S. Dodson*, A-27905 (July 31, 1959). Further, the mere hope or expectation, based upon a general belief, that values will increase at depth is not sufficient to validate a claim. *United States* v. *Duvall and Russell*, 65 I.D. 458 (1958).

Particularly applicable to this case is the long-established rule of the Department, stated in the case of *Rough Rider and Other Lode Claims*, 41 L.D. 242 (1911), as follows (syllabus):

> "The exposure of substantially valueless deposits on the surface of a lode mining claim, in themselves insusceptible of practical development, but which taken in connection with other established geological and mineralogical conditions in the district lead to the hope or belief that a valuable mineral deposit exists within the claim, does not constitute a discovery of a vein or lode within the meaning of the law nor afford a valid basis for a lode location."

In subsequent consideration of the *Rough Rider* case, the Department held that since the Department had for years allowed mining locations to be made in the area and to go to patent on the basis of the showings held to be inadequate in the *Rough Rider* decision, it would not give the ruling quoted a retroactive effect. *Rough Rider and Other Lode Mining Claims,* 42 L.D. 584 (1913). However, the rule has been applied to all claims located after the date of the first *Rough Rider* decision. *Gonzales* v. *Stewart,* 46 L.D. 85, 88 (1917); *United States* v. *Bunker Hill and Sullivan Mining and Concentrating Company,* 48 L.D. 598 (1922); *United States* v. *Arizona Manganese Corporation, United States* v. *Chapin Exploration Company,* 57 I.D. 558 (1942); *United States* v. *Wallace A. Schwartz et al.,* A-7673 (June 20, 1933); *Emil Marks et al.,* A-7671 (November 11, 1933); *Ellen T. Gasson,* A-9897 (November 11, 1933).

Upon a careful review of the evidence, I am of the opinion that the Government clearly made out a prima facie case that there was no discovery here within the requirements of the mining laws on the date of the withdrawal or prior thereto and that the Government's case was not successfully refuted by the appellants.

The evidence at the hearing shows that the two claims in question are located on the Morrison formation which consists of the Brushy Basin member and the Salt Wash member, the latter immediately underlying the Brushy Basin member. (Apparently the term "Morrison formation" is used also to refer only to the Salt Wash member (Tr. 257)). The Brushy Basin member is exposed on the surface of the claims. (Tr. 22.) The principal minerals in the area are uranium and vanadium which are mainly found in the Salt Wash member, although they are also found in the Brushy Basin member. The minerals occur in the Salt Wash member in tabular-shaped ore bodies or rolls which rarely exceed 20 feet in thickness. (Tr. 23-24, 100, 196-197.)

There is no evidence that prior to the effective date of Public Land Order 459 any holes were drilled or shafts sunk on the claims to the Salt Wash member (Tr. 276). The first holes were drilled in 1958, approximately 10 years later, and in 1959 and 1960 (Tr. 249). Uranium ore was struck at a depth of 201 feet in the Salt Wash member (Tr. 251) and approximately 2500 tons of ore have been removed (Tr. 255).

Ralph Spengler, a geologist and mining engineer, testified for the Government that he took four samples from surface points on the claims, two from each claim, and that only one sample showed ore grade material. He said it was a high grade sample which was not representative of the entire radioactivity outcrop that he sampled. (Tr. 57.) He concluded:

> "My opinion is that a person of ordinary prudence would not be justified in the further expenditure of his time and money with a reasonable prospect of developing a paying mine on these claims. I base this opinion upon the evidence that I have observed on the surface of the claims. I base it upon the assays that I have taken; upon the size of this mineralization, which I believe has no appreciable extent, and I base this opinion upon my knowledge of the occurrence of uranium in the Morrison formation, of its characteristics, of its relation to various geological structures * * *." (Tr. 122.)

James McIntosh, also a mining engineer testifying for the Government, took two samples which he had assayed. He said that the assay signified to him that

> "* * * the material I sampled is low grade uranium-vanadium bearing material, and * * * the places I sampled deserve of some more exploratory work, but they do not deserve the commencing of mining operations." (Tr. 212.)

He concurred in Spengler's conclusion stated above (Tr. 222).

The appellants do not appear to contend seriously that their alleged discovery is based upon their surface explorations; rather they attempt to link their surface findings with their subsequent discovery in the Salt Wash member in 1958, over ten years subsequent to the withdrawal of the land from mineral entry.

This is the critical issue in this case, whether the mineralization found in the surface of the claims in the Brushy Basin member as of the effective date of the withdrawal may be considered as a discovery of the mineral deposits found 10 years later at depth in the Salt Wash member. Appellants contend, in effect, that their surface findings constitute such a discovery because they are indicators of and part of the greater values at depth.

At the hearing, F. A. Sitton was the only one to testify for the appellants on this issue. He testified that he had engaged in mining since 1937, that he had mined from the Morrison formation in the area, that in four different groups of claims on which he found mineralization in the surface Brushy Basin formation, he also found paying ore in the "Morrison" (Salt Wash) formation below. On the basis of this experience he stated that there is a definite relationship between the two. (Tr. 242-247, 247 is incorrectly paginated 248.)

Sitton, however, did not testify that there was any physical connection between the surface mineralization and the ore body found below. In fact, in describing his experience in striking ore in the Salt Wash member in the four groups of claims where he first found surface mineralization in the Brushy Basin member, he testified that he found nothing of interest between the surface mineralization and the ore body at depth. The only indication of mineralization below that he relied on was the fact that in each instance he

was drilling in a "soft" formation. (Tr. 258-265.) When asked whether the material in the soft formation was distinguishable from the surrounding material, he simply said that it was "softer"; that he had not paid any attention to or noticed whether it differed in any other way, such as color; that he did not particularly know whether the material was soft until it was drilled (Tr. 259). In other words, he found no vein, lode, fissure, or other geological structure connecting the surface mineralization with the ore deposits below. They were completely disconnected.

The six affidavits introduced by the appellants in support of a new hearing also do not establish that there is any gelogic relation between the Brushy Basin and Salt Wash formations. The affidavit of Elbert E. Lewis states that he is familiar with eleven mines in the Colorado Plateau Region which have produced vanadium and uranium and have reported production from the Brushy Basin, and that many of these "began from outcrops with similar surface mineralization to that found on the DeLuxe claims." This affidavit posits no relation at all between the Brushy Basin and Salt Wash formation. It indicates only other possible mineralization in the Brushy Basin. The affidavit of E. V. Reinhardt merely indicates that both formations contain mineralized areas. The affidavit of Blair Burwell states that there exists confusion as to where the Brushy Basin ends and the Salt Wash begins but that the occurrence of a mineralized conglomerate on the Brushy Basin is evidence of mineralization in the Salt Wash. Burwell's affidavit, although attempting to establish a connection between these two formations, has not pointed to any definitive factual evidence establishing such connection. The affidavit of W. Everett Haldane stated that other claims with which he was familiar had commercial production from the Brushy Basin. The affidavit of Max L. Sitton contains nothing establishing a relationship between the formations. The affidavit of F. A. Sitton states that on a number of claims

where he has found surface mineralization on the Brushy Basin, he has then found further commercial mineralization in the Salt Wash. But, again as at the hearing, he has not established any definite physical or geological linkage between the two.

The testimony of the Government witness clearly stated that there was no relation. Spengler testified,

> "I see no relation between slight shows of mineralization in the Brushy Basin member, and any hope of finding ore in the Salt Wash member." (Tr. 122.)

In response to the question asked of Spengler whether in his study of the mining activity in the Uravan Mineral Belt which includes this claim, he had "discovered any references to any mines which follow directly through a vein or some other similar path, mineralization from the Brushy Basin member of the Morrison formation to the Salt Wash member of the Morrison formation in this area?" Spengler responded,

> "I know of no such mines which follow from the Brushy Basin member into the Salt Wash member in this area." (Tr. 99.)

Spengler reaffirmed several times his opinion that no connection existed (Tr. 132, 148, 166, 172-173, 179-184). He stated,

> "I found no publications written connecting the Salt Wash with the Brushy Basin." (Tr. 185.)

McIntosh, the other Government witness, agreed that there was no connection (Tr. 214).

On the basis of this testimony the Government's witnesses and the absence of countervailing evidence by the appellants, I conclude that no physical or geological connection has been shown to exist between the surface min-

eralization in the claims and the mineral deposits found 10 years later to exist at depth in the claims. The fact that experience in the area might have indicated that ore bodies at depth might be found where surface mineralization existed does not satisfy the requirement of a discovery. The situation here is precisely that ruled on in the *Rough Rider* case, *supra*.

In this connection, only brief note need be taken of appellants' claim that they were surprised by the testimony of the Government witnesses as to the geological theories concerning the manner in which the vanadium and uranium deposits may have been formed in the area. While the theories were advanced for the purpose of showing lack of connection between the mineralization in the Salt Wash member and that in the Brushy Basin, they were admitted to be unproved (Tr. 31-32). Disregarding them completely, as we have done up to now, we have ample evidence of lack of connection upon which to base a decision here. There is no necessity, therefore, to examine the theories advanced.

This leaves for consideration only the belated efforts made in the affidavits submitted to the Director to show that the mineralization existing prior to the withdrawal on the surface of the claims was sufficient to constitute a discovery. At the hearing no serious attempt was made by appellants to claim that their surface findings were sufficient to constitute a discovery. F. A. Sitton did testify that he examined the discovery cuts on the claims in 1944 and that in his opinion they showed mineralization that would have caused a reasonably prudent person to proceed further (Tr. 251). However, he sampled only one claim, the Deluxe; the sample assayed at 1.85 percent vanadium ore (Tr. 251-253). Despite this testimony as to value in 1944, Sitton did not attempt to lease the claims at that time because he did not have a drill rig that would go over 18 to 20 feet. He waited until 1958, 14 years later, before he bought a half-interest and leased a half-interest in the

claims and then he drilled his first hole 201 feet deep to find the ore body in the Salt Wash member.[1] Thereafter he drilled another 46 holes to depths varying from 50 to 230 feet. (Tr. 249-251.) These delayed acts are scarcely indicative of a belief in 1944 that a valuable mine could be developed out of the surface mineralization found on the claims at that time.

C. F. Snyder, one of the locators and appellants, testified that, aside from the discovery work that he did, he did no actual mining on the claims prior to about 1958 and that he did no drilling or other exploratory work at all on the claims (Tr. 275-276). This inactivity from the location of the claims in 1941 to the commencement of drilling operations in 1958 *to a lower formation* is scarcely evidence of a discovery of a valuable deposit in the surface cuts prior to the withdrawal in 1958.

At the hearing there was evidence that in the 1940's vanadium ore had to average 1.25 percent vanadium pentoxide to be sold (Tr. 255). There was also indication that the lowest grade of uranium ore that could be sold was .10 percent uranium oxide (Tr. 113). While this was questioned by the contestees (Tr. 117), they offered no evidence that uranium ore of a lower grade was salable. Of the six samples taken by the Government witnesses only one, described by Spengler as not representative, assayed over .92 percent vanadium pentoxide and .097 percent uranium oxide. The others were much lower (Contestants' Exhibits

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[1] It is interesting and significant to note that according to the abstract of title furnished with the contestees' answer to the contest complaint, the lease to Sitton, executed September 8, 1958, provided that within 20 days from that date lessee was required to start a drilling program and drill no less than 3000 feet and to start a mining operation within 30 days after completion of drilling "providing Lessee shall discover on leases property an ore body of commercial grade and *quantity* [sic] that is amenable to treatment."

17 and 37). An assay certificate submitted by the contestees showed two samples from the claims assaying .05 and .09 percent uranium oxide and .07 and .81 percent vanadium pentoxide (Contestees' Exhibit D).

Looking at the affidavits submitted on appeal to the Director, we find that Lewis sampled an outcrop on the Deluxe claim which assayed at .04 and .105 percent uranium oxide and .41 and .96 percent vanadium pentoxide. Reinhardt cut three samples which showed .062, .014, and .021 percent uranium oxide and .61, .29, and .35 percent vanadium pentoxide. Haldane took a grab sample on the Deluxe claim which ran .66 percent vanadium pentoxide. The other affiants did not sample. However, F. A. Sitton attached a statement of the ore sold from the Deluxe claim, presumably from the Salt Wash deposit, in the period 1959-1962. This statement showed that the ore averaged 1.59 percent vanadium pentoxide and .2178 percent uranium oxide, far higher percentages than those shown by the surface samples taken by the affiants and the Government witnesses.

In short, the great preponderance of the evidence, including that submitted by the contestees, is that the mineralization found on the surface of the claims, even as of this late date, is of such a low grade as to have no commercial value.

In this connection, it is to be noted that, except possibly for the affidavit of Reinhardt, no evidence has been submitted at any time as to the possible or probable size of the vein, lode, or deposit claimed to have been discovered on the surface of the claims. (See Tr. 96, 98.) Thus, even a high grade sample of an isolated bit of material would be meaningless in itself without a showing of the probable size of the deposit from which the sample was taken. Reinhardt's affidavit refers to sampling a 200-foot outcrop which had evidence throughout of vanadium minerals and in two places of ore-grade mineral. However, he sampled the two points with the negligible results listed above.

Thus, although the affiants expressed their opinion that a prudent man would have been justified in 1941 or 1948 in spending time and money on the claims with the reasonable expectation of developing a paying mine, not one stated his belief that the mineralization found on the surface in the Brushy Basin member *constituted in itself* a discovery of a valuable deposit. Rather the affiants were saying no more than that the mineralization found warranted a prudent man in proceeding further to find a valuable deposit which could reasonably be inferred to exist at depth but *which had not yet been reached* when the withdrawal became effective on March 30, 1948.

To summarize, the only valuable mineral deposit shown to exist on the claims is the deposit found by drilling in 1958 to exist at a depth of 201 feet in the Salt Wash formation. There is no evidence that any portion of *this deposit* extends to the surface and was uncovered on March 30, 1948.

Accordingly, it must be concluded that no discovery of a valuable mineral deposit has been shown to have been made as of March 30, 1948, and no showing has been made that a further hearing would be productive of evidence that such a discovery has been made.

Therefore, pursuant to the authority delegated to the Solicitor by the Secretary of the Interior (210 DM 2.2A (4)(a); 24 F.R. 1348), the Assistant Director's decision is affirmed.

ERNEST F. HOM
Ernest F. Hom
Assistant Solicitor
Land Appeals

APPENDIX E

Opinion of Hearing Examiner

UNITED STATES DEPARTMENT OF THE INTERIOR
BUREAU OF LAND MANAGEMENT
Office of Hearing Examiners
924 Boston Building
Salt Lake City 11, Utah

June 15, 1962

DECISION

UNITED STATES OF AMERICA, *Contestant*

v.

C. F. SNYDER, J. F. ALLISON, MAX SITTON, and F. A. SITTON, *Contestees*

COLORADO 236

Involving the DELUXE and MASTER DELUXE lode mining claims situated within sections 22 and 27, T. 44 N., R. 19 W., N.M.P.M. (Lower San Miguel Mining District—San Miguel County), Colorado.

MINING CLAIMS DECLARED INVALID

This is an adversary proceeding under the provisions of Part 221, Title 43, Code of Federal Regulations; by complaint of September 22, 1960, the United States alleged the invalidity of the above-identified mining claims on the following grounds:

> "(a) No discovery of a valuable mineral sufficient to support a mining claim was made within the limits of either of the above described claims prior to the effective date of Public Land Order No. 459 which withdrew sections 22 and 27, T. 44 N., R. 19 W., of the N.M.P.M., from mineral entry, which order is dated March 25, 1948, was filed with the Federal Register at 8:45 a.m.

on March 30, 1948 and was published in the Federal Register on March 31, 1948 in Volume 13, at Page 1763.

"(b) No discovery of a valuable mineral sufficient to support a mining claim was made on that portion of the Master DeLuxe Mining Claim which is located in the W½ of section 22, and in the N½ of section 27, T. 44 N., R. 19 W., of the N.M.P.M., since this area was restored to mineral entry by Public Land Order 698 which was dated February 12, 1951; was filed with the Federal Register on February 15, 1951 at 8:47 a.m.; and was published in the Federal Register on February 16, 1951, in Volume 16, at Page 1638.

"(c) That the discovery, if any, within the boundaries of the Master DeLuxe Mining Claim falls within the boundaries of the DeLuxe Mining Claim which is a prior location."

Timely answer in the form of a general denial was made in behalf of the contestees.

I

Pursuant to notice of March 1, 1961, a hearing in this proceeding was held May 16 and 17, 1961, in Room 41-C, New Custom House, 19th and Stout Streets, Denver, Colorado, before the undersigned hearing examiner.

The United States was represented by Mr. John R. Little, Attorney, Office of the Regional Solicitor, U. S. Department of the Interior, Denver, Colorado; Messrs. Ralph G. Spengler and James F. McIntosh, valuation engineers (mining), Bureau of Land Management, testified in behalf of the United States.

The contestees were represented by Mr. Dan Milenski, attorney at law, of Milenski and Parga, Cortez, Colorado; Messrs. C. F. Snyder and F. A. Sitton testified in behalf of the contestees.

The exhibits introduced by the parties are described in Appendix "B".

The parties have filed briefs and proposed findings of fact and conclusions of law; the hearing examiner's rulings on the proposed findings of fact and conclusions of law are set out in Appendices "C" and "D".

II

Shortly after the commencement of the hearing, the parties presented a stipulation of agreement concerning certain of the matters involved in this proceeding; the matters agreed to are set out in Appendix "A". Under paragraph 1(6) of the stipulation, contestees admit that, as alleged in part (b) of the complaint, no separate discoveries have been made within that portion of the MASTER DELUXE mining claim located in the W½ of section 22 and the N½ of section 27, T. 44 N., R. 19 W., N.M.P.M., Colorado; in view thereof, allegation (b) of the complaint is hereby held to be sustained.

III

According to the respective location certificates (exhibits A and B), the DELUXE and MASTER DELUXE lode mining claims involved in this proceeding were located September 10, 1941, by C. F. and C. A. Snyder for lands within sections 22 and 27, T. 44 N., R. 19 W., N.M.P.M., Colorado;[1] the discovery mineral has been identified as vanadium.

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[1] In a letter dated November 18, 1959, and addressed to the Bureau of Land Management, contestee C. F. Snyder recites that on "July 8, 1941, Mr. C. A. Snyder and myself located the Deluxe Mining Claim. On the morning of July 10, 1941, I personally located the Master Deluxe Claim and on the evening of July 10, 1941, C. A. Snyder relocated the Deluxe Mining Claim and he had both notices recorded." (Exhibit 3)

On March 30, 1948, under the provisions of Public Land Order 459,[2] all of said sections 22 and 27, *subject to valid existing rights,* were withdrawn from all forms of appropriation under the public land laws, including the mining laws, but not the mineral leasing laws, and reserved for the use of the United States Atomic Energy Commission.[3]

Thus, if the two mining claims involved in this proceeding had been validated by discovery *prior* to March 30, 1948, and were existing as valid mining claims on that date, the provisions of Public Land Order 459 would not apply thereto and the area covered by the claims would remain unaffected by the withdrawal order.

On the other hand, if, as contended by the United States, these two mining claims had *not* been validated by discovery *prior* to March 30, 1948, both claims were invalid on that date and the lands covered thereby were thereupon effectively withdrawn under the provisions of Public Land Order 459 for the purposes stated therein.

The primary issue in this proceeding, therefore, is whether the DeLuxe and the Master DeLuxe lode mining claims were valid existing claims on March 30, 1948, and thus within the exceptions proviso of Public Land Order 459.

IV

With respect to the issue set out above, it is well settled that the location of a mining claim is not valid unless and

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[2] Exhibit 1; Public Land Order 459 is dated March 25, 1948, but did not become effective to withdraw the land until March 30, 1948, the date the order was filed with the Federal Register (44 U.S.C., secs. 301-307).

[3] Public Land Order 459 was revoked to the extent of the W½ section 22 and all of section 27 by Public Land Order 698 of February 12, 1951, said revocation being effective the 35th day thereafter.

until there has been a discovery of valuable mineral within the limits of the claim located.[4]

In defining discovery, the courts and the Department have repeatedly held that the requirements of the United States mining laws concerning discovery have not been met until minerals have been discovered *and* the evidence is sufficient to justify a person of ordinary prudence in making an expenditure of labor and money, with a reasonable prospect of success, in developing a valuable mine.[5]

Under the foregoing definition of discovery, it is not necessary that there be an actual disclosure of commercial ore at the discovery point; however, the showing required to validate a mining location *must establish* the fact[6] that there has been discovered a mineral-bearing vein or lode "possessing in and of itself a present or prospective value for mining purposes."[7]

The time-honored test to be applied in determining whether a discovery has been achieved on a lode claim is

---

[4] Revised Statute 2320 (30 U.S.C.A., sec. 23) provides that "no location of a mining claim shall be made until the discovery of a vein or lode within the limits of the claimed located."

[5] *Castle* v. *Womble,* 19 L.D. 455 (1894); *Chrisman* v. *Miller,* 197 U.S. 313, 322 (1905); *Cameron* v. *United States,* 252 U.S. 450, 459 (1920); *United States* v. *Wilmer D. Everett, et al.,* A-27010, Supp. (October 17, 1955); *United States* v. *John Giulio,* A-27842 (February 6, 1959).

[6] The recital of a mineral discovery in a recorded notice of location of a mining claim is not evidence of the discovery; the general rule is that such a recital is merely an *ex parte,* self-serving declaration on the part of the locator, and the discovery must be proved by other evidence. Reiterated by the Department in the case of *Starks* v. *Mackey, et al.,* 60 I.D. 309, 311 (1949), citing *Cole* v. *Ralph,* 252 U.S. 286, 303 (1920); *United States* v. *C. E. Strauss,* 58 I.D. 567, 571 (1943).

[7] *East Tintic Consolidated Mining Claim,* 40 L.D. 271 (1911).

that set forth by the Department in *Jefferson-Montana Copper Mines Company,* 41 L.D. 320 (1912):

> "1. There must be a vein or lode of quartz or other rock in place.
>
> "2. The quartz or other rock in place must carry gold or some other valuable mineral deposit.
>
> "3. The two preceding elements, when taken together, must be such as to warrant a prduent man in the expenditure of his time and money in an effort to develop a paying mine.
>
> "It is clear that many factors may enter into the third element: the size of the vein as far as disclosed, the quality and quantity of mineral it carries, its proximity to working mines and locations in an established mining district, the geologic conditions, the fact that similar veins in the particular locality have been explored with success, and other like facts, would all be considered by a prudent man in determining whether the vein or lode he has discovered warrants a further expenditure or not."

In other words, to constitute adequate discovery under the mining laws it must be conclusively established by competent evidence that a mineral deposit has been actually *found* and physically *uncovered* within the limits of *each* mining claim located, *and* that the situation and formation of the mineral so found and uncovered are such as to justify a prudent man in the further expenditure of time and money, with a reasonable prospect of success, in developing a valuable mine.

The foregoing principles, however, must be considered in the light of the provisions of Public Land Order 459 which is involved in this proceeding, i.e., in addition to the validation of these two lode mining claims by the fact

of discovery, such validation must not only be shown to have been effected *prior* to March 30, 1948, the effective date of Public Land Order 459, but they must also be shown to have been existing as valid mining claims *on* that date.

V

According to the evidence presented in behalf of the United States, the two mining claims involved in this proceeding were examined on July 14 and 16, 1959, and from April 26 to April 29, 1960, by valuation engineer Ralph G. Spengler. In his first examination on July 14, 1959, Mr. Spengler was accompanied by contestee C. F. Snyder; the mining claims and the geology thereof were examined and samples and photographs were taken; during the 1960 examination, Mr. Spengler was accompanied by valuation engineer James McIntosh, at which time the claims were surveyed and mapped, and additional samples and photographs were taken.

These two mining claims are situated immediately east of the top of Horse Range Mesa and are within what has been termed the Uravan Mineral Belt; the claims are entirely within the Brushy Basin member of the Morrison formation; the Brushy Basin member contrasts with the Salt Wash member immediately underneath in that it contains more mudstone and fewer sandstone layers; outcrops in the Brushy Basin member are concealed in portions by overlying debris.

The principal minerals in the area of the Horse Range Mesa are uranium and vanadium and are found mainly in tabular-shaped ore bodies in the Salt Wash member, although there are occurrences of uranium and vanadium mineralization in the Brushy Basin member; the ore bodies in the area range from several inches to several feet in thickness generally, very rarely exceeding twenty feet; these are tabular, irregular, curved ore bodies generally

following the bedding of the sandstones; they do not abruptly or vertically extend into other formations, but are mainly confined to the lenses of the Salt Wash formation within one stratum. (Tr. 24-25)

After referring to the guides established by the U. S. Geological Survey for the location of areas favorable to mineralization (Tr. 24-26) and giving a description of the geology of the general area (Tr. 38-39), witness Spengler testified in detail with respect to his examination of the claims in company with contestee C. F. Snyder, the latter pointing out the places in each of the claims which he believed contained deposits of vanadium; contestee Snyder indicated to witness Spengler that the samples taken were representative of the material showing on the surface of the claims. (Tr. 40-51)

Concerning the significance of the assay results of the samples listed in exhibit 17, witness Spengler testified:

> "The first sample, No. 1D, indicates to me that it is the uranium mineralization. It is below the acceptable grade that will be accepted by the Atomic Energy Commission.
>
> "Sample 2D is approximately ore grade material. However, I must point out this is a high-grade sample. It is the best material showing. It is not, in my opinion, representative of the entire radioactivity outcrop which I sampled.
>
> "Sample 3 MD, which is on the Master Deluxe claim, is not even ore grade and could not even be considered low grade. It shows mineralization.
>
> "The same with sample 4 MD, which shows mineralization but cannot be considered ore grade * * * for either uranium or vanadium." (Tr. 56-57)

Based upon his examination of these two mining claims, witness Spengler testified that in his opinion a person of

ordinary prudence would not be justified in the further expenditure of his time and money with a reasonable prospect of developing a paying mine on these claims; his opinion is based upon evidence he has observed on the surface of the claims, upon assays of samples that he has taken, upon his belief that the mineralization has no appreciable extent, and upon his knowledge of the occurrence of uranium in the Morrison formation, its characteristics and its relation to various geological structures; also, because he sees no relation between slight shows of mineralization in the Brushy Basin member and the hope of finding ore in the Salt Wash member. (Tr. 122)

VI

Mr. James McIntosh, also a valuation engineer for the Bureau of Land Management, testified that he examined these two claims with Mr. Spengler from April 26 to 29, 1960; he corroborated Mr. Spengler's testimony in substance. Mr. McIntosh further testified that he "found no economic mineralization in the claims," and neither did he observe any geologic indication such as faulting or leaching which would be indicative of economic mineralization (Tr. 206); he found a few points of slight radioactivity along the conglomerate region (exhibit 6), but not sufficiently encouraging to justify sampling. Based upon his knowledge of the geological conditions in the area and of his examination of the areas of mineralization to which he had previously testified, witness McIntosh testified that in his opinion the showings of mineralization he noted are substantially in the same condition they would have been in 1948 or the preceding years. (Tr. 213)

Based upon his examination of these two mining claims, the geology of the area and the assay results of samples taken, witness McIntosh testified that in his opinion a prudent man would not be justified in expending more time and effort with the reasonable expectation of developing a paying mine.

VII

Contestee C. F. Snyder was called by the United States as an adverse witness; he testified he was familiar with the conditions on these two claims at the time of Public Land Order 459 of March 25, 1948; he corroborated prior testimony by others to the effect that there has been development and exploration work done on the claims *since* 1948, such as drill holes and sinking of a shaft; he also admitted that, aside from these more recent improvements the conditions on these two claims at the time of the examination by Government engineers are substantially the same as they were at the time of Public Land Order 459 of March 25, 1948.

VIII

Viewed in the light of the prerequisites for discovery as set out hereinabove, I find that the foregoing presentation by the United States—*standing alone, and disregarding any evidence to the contrary*—is sufficient to constitute a *prima facie*[8] case in support of the allegation that a discovery of a valuable mineral had not been made within the limits of either of these two mining claims prior to March 30, 1948, the effective date of Public Land Order 459.

IX

In support of contestee's contention as to the validity of these two mining claims, Mr. F. A. Sitton, a contestee, testified he has been engaged in the occupation of mining since 1937, first as to uranium "and then vanadium and uranium with a little manganese" (Tr. 241-242); he is familiar with the area represented by exhibit 4, having

[8] When the Government contests the validity of a mining claim, it bears only the burden of going forward with sufficient evidence to establish a *prima facie* case; the burden then shifts to the mining claimant to show by a preponderance of the evidence that his mining claim is valid. *Foster* v. *Seaton*, 271 F. 2d 836, 838 (D.C. Circ. 1959).

mined the Radium group of mining claims approximately three miles south of the two mining claims involved here; while mining in the Brushy Basin formation, they "drilled below and immediately picked up our largest body of carnotite" they had ever found (Tr. 243); in the four properties which he operated in the Brushy Basin, he "found the Morrison directly below"[9] (Tr. 246); in each instance of mineralization in the Brushy Basin formation, he found ore in the Morrison formation below.

Mr. Sitton further testified he examined these two mining claims in 1944, as well as the discoveries thereon; in his opinion, the discovery lode in both of these mining claims showed a "mineralization that would have caused a reasonably prudent person, as defined herein, to have proceeded further" (Tr. 251); assay reports of samples taken, the first of which was made in 1944, disclosed "1.85 percent vanadium" on the DELUXE mining claim, but these reports of assay are not available for presentation in evidence (Tr. 253-254); the witness purchased a one-half interest in the DELUXE mining claim in August or September of 1958, and then started drilling operations.

Contestee C. A. Snyder testified he was one of the locators of these two mining claims; he found "cropping of ore in this Brushy Basin formation" (Tr. 269); at the time he located these two claims he believed he had a discovery upon which he could "spend money and work out a successful operation" or he "wouldn't have located" the claims (Tr. 275); however, he did not present any probative evidence concerning the actual circumstances[10] of the claimed discovery of mineral *prior* to March 30, 1948, within *each* of these two claims.

---

[9] At Tr. 257, the witness admitted the term "Morrison" to mean "Salt Wash."

[10] The factors to be considered are defined by the Department in the *Jefferson-Montana Copper Mines* case (page 5 hereinabove).

Upon cross-examination, Mr. Snyder admitted that, with the exception of a minor amount, he did not do any actual mining prior to about 1948, but he did do assessment work. (Tr. 275)

X

Upon consideration of contestees presentation in the light of the issue and of the prerequisites for discovery as contemplated by the United States mining laws, I find the evidence is insufficient to establish that the two mining claims involved in this proceeding were valid existing claims on March 30, 1948, the effective date of Public Land Order 459.

Accordingly, I further find that these two mining claims were *not* valid existing claims under the mining laws on March 30, 1948, and, therefore, did not come under the exception of the withdrawal provision of Public Land Order 459 effective on that date. It follows that on March 30, 1948, the respective areas covered by the two mining claims involved in this proceeding were effectively withdrawn on that date by Public Land Order 459 from all forms of appropriation under the public land laws, including the mining laws but not the mineral leasing laws, and reserved for the use of the U. S. Atomic Energy Commission.

In view of the foregoing, the DELUXE and the MASTER DELUXE lode mining claims must be and they are hereby declared to be invalid. No need, therefore, appears to consider the merits of the allegation (c) of the complaint.

XI

This decision becomes final 30 days from its receipt unless an appeal to the Director, Bureau of Land Management, is filed. If an appeal is taken, there must be strict compliance with the regulations in 43 CFR, Part 221. (See enclosed Form 4-1364.)

If an appeal is taken by the contestees, the amount of the filing fee will be $5.00 for each claim included in the appeal (a total of $10.00 if both claims are included in an appeal) and the adverse party to be notified is: Office of the Regional Solicitor, U. S. Department of the Interior, Room 21, Building 53, Denver Federal Center, Denver 25, Colorado.

JOSEPH G. CONRACE
Joseph G. Conrace
Hearing Examiner

Enclosure

Attachments:
Appendices "A" thru "E"

Distribution:
By Certified Mail
Mr. Dan Milenski, Attorney for contestees
c/o Milenski and Parga, Attorneys at Law
P. O. Box 895, Cortez, Colorado

Messrs. Welborn & Dufford, Attorneys at Law
1700 Broadway, Denver 2, Colorado
Regional Solicitor, Denver 25, Colorado (2)

By Regular Mail
Standard Distribution

APPENDIX F

The Mineral Location Act of 1872, 41 Stat. 437, 30 U.S.C. § 22:

§ 22. Lands open to purchase by citizens

Except as otherwise provided, all valuable mineral deposits in lands belonging to the United States, both surveyed and unsurveyed, shall be free and open to exploration and purchase, and the lands in which they are found to occupation and purchase, by citizens of the United States and those who have declared their intention to become such, under regulations prescribed by law, and according to the local customs or rules of minors in the several mining districts, so far as the same are applicable and not inconsistent with the laws of the United States.

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Office-Supreme Court, U.S.
FILED
JUN 13 1969
JOHN F. DAVIS, CLERK

No. 110

In the Supreme Court of the United States

OCTOBER TERM, 1969

RUTH SNYDER, ET AL., PETITIONERS

v.

WALTER J. HICKEL, SECRETARY OF THE INTERIOR

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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In the Supreme Court of the United States

OCTOBER TERM, 1968

No. 1389

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OPINION BELOW

The opinion of the court of appeals sitting *en banc* (Pet. App. 1a–3a) and the original opinion of the court to which it adhered are reported at 405 F. 2d 1179.

JURISDICTION

The judgment of the court of appeals *en banc*, reaffirming its original judgment, was entered on February 12, 1969. The petition for a writ of certiorari was filed on May 13, 1969. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

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QUESTION PRESENTED

Whether the Secretary of the Interior applied the proper standard in determining whether petitioners had made a discovery of a "valuable mineral deposit."

STATUTE INVOLVED

The Act of May 10, 1872, 17 Stat. 91 (now 30 U.S.C. 22), is set forth at Pet. App. 50a.

STATEMENT

After appropriate administrative proceedings, the Secretary of the Interior held (Pet. App. 23a–36a) that petitioners' unpatented lode mining claims were null and void for lack of a discovery of a valuable mineral deposit as of March 30, 1948, the date the lands were withdrawn from location under the mining laws and reserved for the use of the Atomic Energy Commission subject only to valid existing rights (Public Land Order No. 459, March 25, 1948, 13 Fed. Reg. 1763). The validity of the withdrawal order is not challenged.

The district court, upon a review of the administrative record (Pet. App. 4a–15a), set aside the decision of the Hearing Examiner (Pet. App. 37a–49a), which had been affirmed by the Director of the Bureau of Land Management (Pet. App. 16a–22a) and the Secretary of the Interior (Pet. App. 23a–36a), on the ground that the testimony of the government's expert witnesses was based on an erroneous test for determining the existence of a mineral discovery. The district court, in addition, ruled that the government's

expert witnesses had been incompetent to testify for various reasons (Pet. App. 7a) and that, absent their opinions, the evidence was insufficient to support the administrative determination (Pet. App. 9a).

The court of appeals, sitting *en banc,* reversed "on the authority of *United States* v. *Coleman* [390 U.S. 599] * * *" (Pet. App. 2a). The court of appeals held that the Secretary had applied the correct standard in determining that, for want of a valuable mineral deposit, no discovery had been made at the time of the land's withdrawal; that the government witnesses were competent to testify; and that the Secretary's decision was supported by substantial evidence and was not clearly erroneous (Pet. App. 2a–3a). The petition in this Court seeks review of only the first of these rulings.

ARGUMENT

Contrary to petitioners' contention, this case does not present a novel or unresolved issue as to the standard to be applied in determining whether a valuable mineral deposit has been discovered, and there is no conflict between the decision below and that of the court of appeals for the Ninth Circuit in *Converse* v. *Udall,* 399 F. 2d 616, certiorari denied, 393 U.S. 1025. Specifically relying on this Court's ruling in *Coleman, supra,* that "the marketability test" (*i.e.,* whether "the mineral can be 'extracted, removed and marketed at a profit' * * *," 390 U.S. at 600) is merely "a logical complement to the 'prudent-man test' which the Secretary has been using to interpret the mining laws since 1894" (390 U.S. at 602), both

courts of appeals held that the Secretary may apply the marketability test to mining claims for metallic as well as for nonmetallic minerals. Indeed, the court in *Converse* specifically stated that *Coleman* makes "* * * it clear that the marketability test is applicable to all mining claims" (399 F. 2d at 621).

Petitioners complain (Pet. 8–9), however, that the court below failed to recognize the refinements in applying the marketability test that were elaborated in the *Converse* opinion. There was, however, no need in the present case for the court to consider these possible refinements—just as the court found "[o]f no determinative concern in this case * * * refinements of evidentiary problems concerning the extent to which resort may be had to technological aids and inferences in the modern context on the basic issue of mineral discovery as now defined by the Supreme Court" (405 F. 2d at 1180; Pet. App. 3a). The decisive issue in this case was whether petitioners' surface mineralization claims as of the withdrawal date qualify as a discovery of mineral deposits which are structurally unconnected with the surface and which were found by drilling to a depth of 201 feet ten years after the lands had been withdrawn from location under the mining laws (see Pet. App. 18a–19a, 29a–30a). The Secretary correctly ruled that the facts known on the withdrawal date are controlling, and that ruling is not challenged in this Court.

CONCLUSION

For the reasons stated, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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